Supreme Court, U.S.
FILED
AUG 19 1999
CLERK

No. 99-137

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

J. WAYNE GARNER, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, JAMES T. MORRIS, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, GARFIELD HAMMONDS, JR., former Chairman of the State Board of Pardons and Paroles of the State of Georgia, BOBBY K. WHITWORTH, Member of the State Board of Pardons and Paroles of the State of Georgia, and TIMOTHY E. JONES, former Member of the State Board of Pardons and Paroles of the State of Georgia,

Petitioners,

v.

ROBERT L. JONES

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S MOTION TO PROCEED *IN FORMA PAUPERIS*

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RESPONDENT'S MOTION TO PROCEED *IN FORMA PAUPERIS*

NOW COMES Respondent, Robert L. Jones, and pursuant to Supreme Court Rule 39, files this motion to proceed *in forma pauperis*. Respondent, an inmate at Hays State Prison in Trion, Georgia, sought leave to proceed *in forma pauperis* in this action in the United States District Court for the Northern District of Georgia. Respondent's request was granted by the District Court in an order dated November 17, 1995. Jones continued to proceed *in forma pauperis* through his appeal to the United States Court of Appeals for the Eleventh Circuit. On both occasions the motions to proceed *in forma pauperis* were granted.

Counsel for Respondent, Elizabeth T. Kertscher (f/k/a Elizabeth B. Thompson) was appointed as counsel for Respondent by Judge Edmondson of the United States Court of Appeals for the Eleventh Circuit pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A. Supreme Court Rule 9 allows an attorney to file documents in the Supreme Court in a representative capacity without first being admitted to the Court's Bar, if the attorney is appointed under the Criminal Justice Act. Further, Supreme Court Rule 39 provides that no declaration or affidavit of indigency in support of this motion is required where the United States Court of Appeals has appointed counsel under the Criminal Justice Act.

Respondent respectfully requests that this Court grant his motion to proceed *in forma pauperis* and to allow counsel to file this motion and the accompanying Brief in Opposition to Petition for Writ of Certiorari based on her appointment under the Criminal Justice Act.

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Petitioners,

v.

ROBERT L. JONES

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Whether the ex post facto clause of the United States Constitution bars the State of Georgia from applying its amended parole regulations to inmates whose crimes predated the amendment, where the amendment increases the time between life-sentenced inmates' parole reconsideration from three to eight years, or whether the change creates only "the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment."

2.

Whether the decision of the United States Court of Appeals for the Eleventh Circuit conflicts with the decisions of other United States Courts of Appeals and the appellate courts of the several states as to the meaning and import of this Court's decisions in *California Dep't of Corrections v. Morales* and *Lynce v. Mathis*.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the Court of Appeals and in the District Court were as listed in the caption. For the purposes of Respondent's claims for declaratory and injunctive relief, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Petitioners are Walter S. Ray, Chairman, Bobby K. Whitworth, Garfield Hammonds, Jr., Dr. Betty Ann Cook, and Dr. Eugene P. Walker, the current members of the Board.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. A) is reported as *Jones v. Garner*, 164 F.3d 589 (11th Cir. 1999). The order on the merits by the United States District Court for the Northern District of Georgia (Pet. App. B) is No. 1:95-cv-3012-CAM (August 25, 1997).

JURISDICTION

The court of appeals entered its opinion and judgment on January 6, 1999 and entered its denial of Petitioners' Motion For Rehearing and Suggestion of Rehearing En Banc on April 19, 1999. The petition for a writ of certiorari was docketed on July 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 10:

> No State shall . . . pass any . . . ex post facto Law . . . .

STATEMENT

On July 23, 1974, Respondent Robert L. Jones was sentenced to life imprisonment following his conviction for murder in the Superior Court of Fulton County, Georgia. Respondent was convicted a second time and again sentenced to life imprisonment in the Superior Court of Fulton County on August 20, 1982.

At the time of Mr. Jones' last conviction in 1982, Georgia's Parole Board regulations required that all life sentence inmates be first considered for parole after serving seven year's imprisonment, and for those inmates denied parole, the regulations provided for reconsideration of these inmates no less than every three years.

In 1985, three years after Mr. Jones' conviction, the Board amended its regulations to provide for parole reconsideration only one every eight years. The amended provision reads:

> Reconsideration of those inmates serving life sentences who have been denied parole shall take place at least every eight years. The Board will inform inmates denied parole of the reasons for such denial without disclosing confidential sources of information or possibly discouraging diagnostic opinions.

Ga. Admin. Comp. Ch. 475-03-.05(2).

Georgia's parole regulations do not require a hearing in connection with the parole reconsideration process. Parole board members decide an inmate's eligibility solely upon the contents of the inmate's file. Georgia's amended regulations do not require the parole board to make specific inquiries or findings of fact regarding an inmate's parole eligibility before deferring an inmate's next reconsideration for an eight year period.

Respondent Jones was initially considered for parole in 1989 after his first seven years in prison, as required by the regulations that were in place at the time his offense was committed. However, based on the 1985 amendment to the Parole Board regulations, after denying Jones' parole in 1989, the Board informed him that his next consideration would occur in 1997 (eight years later), rather than three years from the date of his first denial, as provided by the earlier rules.

However, in the interim, the Eleventh Circuit Court of Appeals decided the case of *Akins v. Snow*, 922 F.2d 1558 (11th Cir.), *cert. denied*, 501 U.S. 1260 (1991). The Eleventh Circuit held that the Constitution's ex post facto clause prohibited the Parole Board from applying the new regulations to inmates whose offenses pre-dated the amendment. Accordingly, the Parole Board rescheduled Jones' parole reconsideration date and thereafter reconsidered Jones for parole at three-year intervals, in 1992 and again in 1995.

After Jones' 1995 reconsideration, this Court decided the case of *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995). The Parole Board interpreted *Morales* as implicitly overruling the Eleventh Circuit's decision in *Akins v. Snow*, *supra*. Accordingly, the Board scheduled Jones and other similarly situated inmates for reconsideration in the year 2003 (eight years later).

Jones filed suit pursuant to 42 U.S.C. §1983, contending that retroactive application of the amended Parole Board regulations violated the ex post facto laws of the United States Constitution by deferring his parole reconsideration for a period of five years longer than the earlier regulations would have allowed. The United States District Court for the Northern District of Georgia granted summary judgment in favor of

Petitioners. However, the Eleventh Circuit Court of Appeals reversed, holding that *Morales* did not implicitly overrule its decision in *Akins v. Snow* because of the factual differences between the California regulations at issue in *Morales* and the Georgia rules.

ARGUMENT

I. STANDARDS FOR GRANTING A PETITION FOR WRIT OF CERTIORARI.

A petition for a writ of certiorari will be granted only for compelling reasons. Supreme Court Rule 10 outlines an illustrative list of reasons the Court believes are compelling. These include conflicts between circuit courts or state supreme courts, conflicts between lower courts and the Supreme Court, and important questions of federal law that the Supreme Court has yet to address. Sup. Ct. R. 10. Petitions for writs of certiorari are rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly state rule of law. *Id.*

Petitioners' request for a writ of certiorari fails to show any compelling reason why the Supreme Court should address this case. This Court clearly set out the standards to be followed in addressing the issue presented in this case in *Morales*. The Eleventh Circuit Court of Appeals simply recognized factual distinctions between the regulations challenged in *Morales* from the ones employed by the Georgia Parole Board. The Eleventh Circuit's decision was made within the framework of *Morales* and without creating any conflict. Although other courts have reached different results, each of those cases addressed different factual situations which, like *Morales*, are distinguishable from the rules analyzed by the Eleventh Circuit in this case. Therefore, there is no compelling reason for this Court to revisit the Eleventh Circuit's decision in this case.

II. THE ELEVENTH CIRCUIT PROPERLY APPLIED THE BURDEN OF PROOF IN EVALUATING THE CONSTITUTIONALITY OF GEORGIA'S AMENDED PAROLE BOARD REGULATIONS.

Petitioners contend that the Eleventh Circuit Court of Appeals placed upon Petitioners the burden of showing that the application of Ga. Admin. Comp. Ch. 473-03-.05(2) would not pose a risk of increasing Jones' sentence. In support of this proposition, Petitioners misstate the proper burden to be applied in evaluating this case, and misstate the Eleventh Circuit's opinion in describing the burden that was applied in this case.

Petitioner contends that in any ex post facto inquiry, the burden is on the prisoner to demonstrate that the law in question will, as applied to his particular case, violate the ex post facto clause. Petitioner cites this Court's decision in *Lynce v. Mathis*, 519 U.S. 433 (1997) in support of this proposition. Petitioner interprets *Lynce* as requiring that Jones demonstrate that he would have received parole under the old system before a finding of an ex post facto violation could be made. This is simply incorrect.

This Court's decisions in *Lynce v. Mathis* and *California Dep't of Corrections v. Morales* specifically did not require such showing from the prisoners that contested their states' changes in parole review regulations. In *Morales*, this Court stated "in evaluating the Constitutionality of the 1981 amendment, we must determine whether it produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." 514 U.S. at 509. The Court specifically did not require the particular inmate to show that he would have been granted parole under the old system but not the new, saying "we have previously declined to articulate a simple 'formula' for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the Constitutional prohibition... ." *Id.* In fact, the Court specifically indicated, "we have

held that a party asserting an ex post facto claim need not carry the burden of showing that he would have been sentenced to a lesser term under the measure or range of punishments in place under the previous statutory scheme... ." (citing *Lindsey v. Washington*, 301 U.S. 397 (1937)). Instead, the challenging party must establish that the measure of punishment itself has changed. *Id.* An inmate may satisfy this burden by pointing to objective considerations that support the conclusion that the amended rules may change the "quantum of punishment." *Morales*, 514 U.S. at 506; *Lynce*, 117 S.Ct. at 896. The proper inquiry is whether there is any reason "to conclude that the amendment will have any effect on any prisoner's actual term of confinement." *Lynce*, 117 S.Ct. at 896; *Morales*, 514 U.S. at 512.

The burden of proof set forth in *Lynce* and *Morales* is precisely the standard applied by the Eleventh Circuit Court of Appeals in the case below. *See*, e.g., 164 F.3d 589, 591-592 ("[*Morales*] directed that each case be analyzed by asking 'whether [the law at issue] produces a sufficient risk of increasing the measure of punishment attached to the covered crimes'..."). Nothing in the Eleventh Circuit's opinion supports the inference drawn by Petitioner that the Eleventh Circuit placed any burden of proof on Petitioner that should have been placed on the Respondent; instead, the Court merely analyzed the largely undisputed facts within the framework articulated by this Court in *Morales*, and determined that the facts, as presented by Respondent, indicated a sufficient risk that the amended Parole Board regulations had the purpose or effect of increasing the quantum of punishment.

III. THE ELEVENTH CIRCUIT'S OPINION IN *JONES V. GARNER* IS NOT IN CONFLICT WITH PRECEDENTS OF THIS COURT, OTHER COURTS OF APPEALS, AND THE APPELLATE COURTS OF THE SEVERAL STATES.

Petitioner contends that the Eleventh Circuit's decision in *Jones* is in conflict with the decisions of this Court in *Morales* and *Lynce*, and decisions of the First[1], Fourth[2], Fifth[3], and Sixth[4] Circuits, as well as state appellate courts in Colorado[5], Florida[6], Illinois[7], and Tennessee[8], each of which have rejected ex post facto challenges to various parole procedures. Petitioner characterized these decisions as conflicting with the holding in *Jones v. Garner* and creating a split in the circuit courts and state appellate courts on the issue presented herein. However, a review of these cases shows that there is no conflict in the application of laws or in the interpretation of this Court's precedent regarding the interpretation of ex post facto challenges to parole regulations. Instead, Georgia's parole board took a unique step in tacking on an additional five years to inmates' sentences through a retroactive rule amendment, a situation that is factually distinct from any case cited by Petitioner. The Eleventh Circuit's decision in *Jones* therefore does not conflict with either the precedents of this Court or those of other state and federal courts. None of the cases cited from other circuits or states involve the type of parole reconsideration scheme set forth in *Jones*.

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[1] *Hamm v. Latessa*, 72 F.3d 947, 957-59 (1st Cir. 1995), *cert. denied*, 519 U.S. 836 (1996).
[2] *Roller v. Gunn*, 107 F.3d 227, 234-37 (4th Cir.), *cert. denied*, 522 U.S. 874 (1997); *Hill v. Jackson*, 64 F.3d 163, 167-71 (4th Cir. 1995).
[3] *Allison v. Kyle*, 66 F.3d 71, 74-75 (5th Cir. 1995).
[4] *Shabazz v. Gabry*, 123 F.3d 909, 913-916 (6th Cir.), *cert. denied*, 522 U.S. 1019 (1997); *Phelps v. Traugher*, 1996 U.S. App. LEXIS 8009 (6th Cir. Tenn. Mar. 20, 1996).
[5] *Furnari v. Zavaras*, 914 P.2d 508, 509-11 (Colo. App. 1996).
[6] *Tuff v. State*, 1999 Fla. App. LEXIS 6424 (Fla. App. May 19, 1999).
[7] *Fletcher v. Williams*, 179 Ill. 2d 225, 235-36, 688 N.E. 2d 635, 641-42 (1997).
[8] *Jordan v. Tennessee Board of Paroles*, 1997 Tenn. App. LEXIS 27 (Tenn. App. January 15, 1997).

As this Court pointed out in *Morales*, the determination of whether a particular parole reconsideration scheme will violate the ex post facto clause is highly dependent on the particular facts and circumstances presented by each case. The Eleventh Circuit in *Jones* carefully distinguished the factual circumstances presented by *Morales* from those presented in the instant case. The Eleventh Circuit found that there were significant differences between the California regulations considered in *Morales* and those at issue in *Jones*. First, the California regulations applied to a much narrower class of inmates (those convicted for an offense involving the taking of a life); the Georgia regulations applied to all life sentence inmates, a broad class of prisoners that the Eleventh Circuit found consisted of "many inmates who can expect at some point to be paroled." Second, the California regulations required that the California Board of Prison Terms conduct a "full hearing and review" and make specific findings that it would not be reasonable to expect that parole would be granted during the following two years; the Georgia regulations do not require a full hearing or any particularized findings supporting its conclusion that parole would not be granting during the intervening eight years. Finally, the California regulations in *Morales* provided a means for correcting any effort in deferring an inmate's review through advancing the prisoner's actual release date; Georgia's parole procedures do not provide the Board with such a means of ensuring that a prisoner that is wrongfully deferred will not spend more time in jail as a result.

The cases from other circuits and jurisdictions cited by Petitioner each analyze the particular facts and circumstances presented by their respective parole procedures, finding that the proposed changes do not create a significant risk of increased punishment. Not one deals with a regulation that allows a parole board to defer an

inmate's parole reconsideration for eight years without procedural safeguards. In fact, the most severe of the changes to a parole reconsideration procedure in the cases cited by Petitioner provided for a maximum deferral of five years (a deferral of three years from what would have been required under the previous procedure), with procedural safeguards not present under the Georgia rules. *Tuff v. State*, 732 So.2d 461 (Fla. 3rd DCA 1999). In contrast, Georgia's rules added an additional five years to an inmate's time between considerations (for a total of eight years) without any significant safeguards.

The Eleventh Circuit's analysis of Georgia's regulations followed this Court's analysis in *Morales* to the letter. The Eleventh Circuit simply found that the facts and circumstances presented by the particular amendments at issue here required a different result than the California rules analyzed by this Court in *Morales*. No significant conflict between circuits is presented by this decision, and certiorari should not be granted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioners,

v.

ROBERT L. JONES

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

CERTIFICATE OF SERVICE

This is to certify that I have this day served the appropriate parties in the foregoing matter a copy of **RESPONDENT'S MOTION TO PROCEED *IN FORMA PAUPERIS*** and **BRIEF FOR THE RESPONDENT IN OPPOSITION** as follows:

United States Postal Service
Neal B. Childers
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This 18th day of August, 1999.

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